109 FERC ¶ 61,190
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

PPL University Park, LLC — Docket No. EL04-122-000

v.

Commonwealth Edison Company

ORDER DISMISSING COMPLAINT

(Issued November 22, 2004)

1. On August 13, 2004, PPL University Park, LLC (PPL) filed a complaint against Commonwealth Edison Company (ComEd) requesting that the Commission find certain terms and conditions of the interconnection agreement between ComEd and PPL (Interconnection Agreement)[1] to be inconsistent with Commission policy and thus unjust, unreasonable, and unduly discriminatory in failing to reimburse PPL for upgrades to the ComEd system that PPL paid for. As discussed below, this order dismisses PPL's complaint finding that PPL has failed to meet the public interest standard required to modify the interconnection agreement. This order benefits customers because it ensures that the terms, conditions, and rates for interconnection service filed with and accepted by the Commission are enforced as written.

Complaint

2. PPL states that the Interconnection Agreement sets forth the rates, terms, and conditions for the construction, maintenance, and operation of certain facilities for the interconnection of its merchant peaking plant, located near University Park, Illinois, to ComEd's transmission system. According to PPL, the Interconnection Agreement assigns the costs for all interconnection facilities – regardless of whether they are network upgrades located at or beyond the point of interconnection to the transmission

[1] Director Letter Order, ER01-3143-000 (issued November 14, 2001).

system or upgrades to remove system overloads – to PPL without provision for credit, and misclassifies the network upgrade facilities as direct assignment facilities.

3. PPL explains that it constructed network upgrades to the ComEd transmission system and has not received reimbursement, *i.e.*, transmission service credits from ComEd. It argues that in compliance with Commission precedent, the facilities that PPL paid to construct at or beyond the point of interconnection to ComEd's transmission system should be re-classified as network upgrades in the Interconnection Agreement and PPL should be reimbursed for the costs associated with their construction plus interest. In addition, PPL argues that ComEd's failure to provide credits is in violation of its open access transmission tariff (OATT) because the facilities that PPL paid for include system upgrades necessary to remove overloads and ComEd's OATT states that "Applicant shall be entitled to a credit equal to the amount paid by Applicant for system upgrades necessary to remove overloads . . . ."[2] Also, PPL argues that the Commission has found interconnection agreements that do not provide credits plus interest to reimburse a generator for its network upgrade investment unjust and unreasonable.[3] Moreover, PPL argues that ComEd's denial of network upgrade credits to PPL represents a direct violation of ComEd's commitment, expressed to the Commission[4] and included in the Interconnection Agreement,[5] and would allow ComEd to collect twice for transmission service in violation of the Commission's prohibition against "and" pricing.

[2] C*iting* Section 11 of ComEd's OATT.

[3] *Citing, e.g., Southern company Services, Inc.*, 105 FERC ¶ 61,055 at 61,327-28 (2003); *Illinois Power Company*, 103 FERC ¶ 61,032 at 61,148-49 (2003); *Southwest Power Pool, Inc.*, 100 FERC ¶ 61,248 at 61,880 (2002).

[4] *Citing Commonwealth Edison Company*, 91 FERC ¶ 61,083 at 61,300 (2000).

[5] *Citing* section 4.6 of Interconnection Agreement,

> This Agreement and all rights, obligations, and performances of the Parties hereunder, are subject to all applicable federal state and local laws . . . Notwithstanding the foregoing, each Party shall have the right . . . to contest the application of any Applicable Laws and Regulations to such Party before the appropriate Governmental Authority.

4. In addition, PPL argues that the Commission should review the Interconnection Agreement pursuant to the just and reasonable standard of the Federal Power Act (FPA). PPL states that the Interconnection Agreement does not contain a *Mobile-Sierra* clause[6] requiring review under the public interest standard, but rather explicitly permits either party unilaterally to file a complaint with the Commission to resolve disputes arising thereunder, thus triggering review under the just and reasonable standard. Specifically, PPL cites to section 12.4 of the Interconnection Agreement which states that "Nothing in this Agreement shall preclude, or be construed to preclude, either Party from filing a petition or complaint with FERC with respect to any arbitrable claim over which FERC has jurisdiction," and section 4.6 discussed above. PPL points out that the Commission has found that the ability to file complaints unilaterally, without consent of the other party to the contract, invokes the just and reasonable standard of review,[7] whereas contracts that require joint filings or specifically invoke the *Mobile-Sierra* public interest standard of review, are subject to the higher public interest standard of review.[8]

5. PPL argues that reviewing the Interconnection Agreement in accordance with the just and reasonable standard is also consistent with: (1) PJM Interconnection, LLC's OATT, which provides for the review of interconnection agreements under the just and reasonable standard; and (2) the Commission's Order No. 2003, in which the Commission stated that its policy "has made clear that Interconnection Agreements are evaluated according to the just and reasonable standard."[9]

6. Also, PPL argues that the Interconnection Agreement unduly discriminates against it because ComEd's treatment of PPL is not comparable to the treatment it has provided to other generators. PPL states that while the Interconnection Agreement does not reimburse PPL for network upgrades, ComEd does reimburse other generators for the

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[6] *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[7] *Citing, e.g., Niagara Mohawk Power Corp.*, 104 FERC ¶ 61,279 (2003); *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983).

[8] *Citing, e.g., PacifiCorp v. Reliant Energy Services, Inc., et al.*, 103 FERC ¶ 61,355 at P 36 (2003).

[9] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146 at P 21 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (March 26, 2004), FERC Stats. & Regs., Regulations Preambles ¶ 31,160 (2004) (Order No. 2003-A), *reh'g pending*.

network upgrades that they fund. PPL further states that although it initially executed the Interconnection Agreement that failed to explicitly provide for credits, it now seeks contract reformation contemplated by the contract to end the discriminatory treatment to which it is subjected, and in accordance with Commission policies.

Notice of Filing and Answers

7. Notice of PPL's complaint was published in the *Federal Register*, 69 Fed. Reg. 52,006 (2004), with the answer to the complaint and all comments, interventions or protests due on or before September 2, 2004. ComEd filed a timely answer to the complaint and PPL filed an answer to ComEd's answer.

Answer

8. ComEd states that the Commission should reject PPL's complaint. It argues that the Interconnection Agreement: (1) obligates PPL to reimburse ComEd for certain interconnection facilities cost under section 7.1;[10] (2) does not provide for PPL to receive transmission credits for interconnection facilities, and (3) may not be amended or modified absent written agreement by the other party under section 14.2[11] and that ComEd has not agreed to the contract modification sought by PPL in its Complaint. Further, ComEd points out that neither PPL nor any other party filed a protest when the Interconnection Agreement was filed with the Commission.

9. ComEd also argues that sections 4.6 and 12.4 of the Interconnection Agreement do not permit unilateral modifications. Specifically, ComEd states that section 4.6 is nothing more than a "'generic contract clause compelling both parties to adhere to the law'"[12] that is irrelevant to the questions whether the parties are permitted to seek unilateral modification of the Interconnection Agreement.

[10] Section 7.1 of the Interconnection Agreement states that PPL "shall reimburse ComEd for all Interconnection Costs incurred by ComEd" and sets forth schedules for determining such costs.

[11] Section 14.2 of the Interconnection Agreement states that "No amendment or modification to this Agreement or waiver of a Party's rights hereunder shall be binding unless it shall be in writing and signed by the Party against which enforcement is sought."

[12] *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998).

10. With regard to section 12.4, ComEd states that this section is part of the Interconnection Agreement's dispute resolution article and must be construed in that context. ComEd states that section 12.2(d) deals with limitations on the authority of the arbitrators, stating: "The arbitrators shall have the right only to interpret and apply the terms and conditions of this Agreement and to order any remedy allowed by this Agreement, but may not change any term or condition of this Agreement . . . ." ComEd argues that the plain meaning of this language is that an assertion by one contracting party that its agreement is unjust, unreasonable or unduly discriminatory is beyond the scope of the arbitrators' authority, regardless of whether the other contracting party "disputes" this view. In addition, ComEd argues that section 12.4 limits the scope of complaints that may be filed to "any arbitrable claim." ComEd states that nothing in this provision states, suggests or implies that simply by choosing to have a dispute resolved by the Commission rather than by arbitration, may a party authorize the Commission to do what the arbitrators are forbidden to do – namely, to change, as opposed to interpret or apply, the contract. ComEd further argues that neither ComEd's OATT nor PJM's OATT permits unilateral modifications to the Interconnection Agreement.

11. ComEd states that because the Interconnection Agreement does not permit unilateral modification, it may only be modified under the *Mobile-Sierra* public interest standard. Under this standard, ComEd argues, the Interconnection Agreement is not contrary to the public interest and, therefore, may not be modified under section 206 of the FPA. ComEd asserts that under section 206, PPL bears the burden of proving with substantial evidence that the Interconnection Agreement is contrary to the public interest. Specifically, to justify the modification of the Interconnection Agreement, PPL must show that the Interconnection Agreement (1) impairs the ability of the public utility to continue service, (2) casts upon other consumers an excessive burden, or (3) is unduly discriminatory. ComEd argues that PPL has made no such showing. In fact, with regard to PPL's "unduly discriminatory" argument, Comed states that the disparity in the terms and conditions of the Interconnection Agreement and the terms and conditions of ComEd interconnection agreements with other generators is the result of private contract and the fact that section 14.2 of the Interconnection Agreement does not permit unilateral changes to the agreement.

12. With regard to PPL's claim that the Interconnection Agreement mischaracterizes network facilities as interconnection facilities, ComEd argues that PPL is seeking to give retroactive effect to the definition of network upgrades established in Order No. 2003, which was effective some three years after the Interconnection agreement was executed, and which the Commission has said will not be given retroactive effect.[13]

[13] Order No. 2003 at P 911.

<u>Discussion</u>

A. <u>Procedural Matters</u>

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept PPL's answer and will, therefore, reject it.

B. <u>Analysis</u>

14. We will dismiss PPL's complaint. The two main issues before us are: (1) whether PPL is seeking a modification to the Interconnection Agreement, and (2) if that is the case, whether we should review the modification under the just and reasonable standard or the *Mobile-Sierra* public interest standard.

15. First, it is clear that PPL's request, that the Commission allow it to be reimbursed for what PPL characterizes as network upgrades to the ComEd transmission system, is a modification to the Interconnection Agreement. As both PPL and ComEd state, the Interconnection Agreement does not provide for transmission service credits for network upgrades and, moreover, the Interconnection Agreement does not even refer to "network upgrades," but only to "interconnection facilities."[14]

16. Second, it is also clear that the standard to be applied to PPL's request for modification is the *Mobile-Sierra* public interest standard. As PPL itself points out, the Commission has found that contracts that require joint filings in order to implement modifications are subject to the public interest standard of review, *i.e.*, *Mobile-Sierra*.[15] Section 14.2 of the Interconnection Agreement explicitly provides that no amendment or modification may be made absent written agreement by the other party.[16] Therefore, the public interest standard must apply.

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[14] *See* section 7.1 of Interconnection Agreement.

[15] *Citing, e.g., PacifiCorp v. Reliant Energy Services, Inc., et al.*, 103 FERC ¶ 61,355 at P 29 (2003).

[16] *Cf. Redbud Energy LP*, 107 FERC ¶ 61,102 at P 11, *reh'g denied*, 109 FERC ¶ 61,119 (2004) (noting this exact language as limiting the rights to modify an interconnection agreement).

17. PPL's argument that section 12.4 of the Interconnection Agreement allows it to file complaints unilaterally over an arbitrable claim and, thus, invoke the just and reasonable standard of review, is not correct. Section 12.2(d) states that arbitrators "shall have the right only to interpret and apply the terms and conditions of this Agreement . . . but may not change any term or condition of this Agreement." Therefore, an "arbitrable claim" may not involve a modification to the Interconnection Agreement, but an interpretation or application of the contract. What PPL is requesting in this proceeding is a modification of the Interconnection Agreement that should be reviewed in light of section 14.2, and thus, the public interest standard.

18. We also agree with ComEd and find that section 4.6 of the Interconnection Agreement is irrelevant as to whether the parties are permitted to seek unilateral modification of the Interconnection Agreement.

19. With regard to PPL's argument that the Interconnection Agreement unduly discriminates against it because ComEd's treatment of PPL is not comparable to the treatment it has provided to other generators, we find it invalid. We agree with ComEd that the disparity is the result of private contract and section 14.2 of the Interconnection Agreement requiring both parties to agree to a modification.

20. Because we have found that *Mobile-Sierra* applies to PPL's requested modification, we now analyze whether PPL has met that burden. PPL's basis for its modification is that the Interconnection Agreement does not provide reimbursement to PPL for what it characterizes as network upgrades that it has funded in accordance with Commission policy and precedent. First, we must note that the Commission has found that the fact that an interconnection agreement may have become an unfavorable bargain, as PPL appears to argue, is not, by itself, a sufficient justification to change an interconnection agreement.[17] Second, we have stated that in order to meet the public interest standard there needs to be a demonstration that the contract in question caused financial distress for the complainant so as to threaten its ability to continue service, that the contract casts an excessive burden on its customers, that the contract was unduly discriminatory to the detriment of other customers that are not parties to this proceeding, or that any other factors on this record demonstrate that the contract is contrary to the

[17] *See, e.g., Redbud,* 107 FERC ¶ 61,102 at P 11, *reh'g denied*, 109 FERC ¶ 61,119 at P 10; *Southern Co. Services, Inc., et al.,* Opinion No. 300, 43 FERC ¶ 61,003, *reh'g denied,* Opinion No. 300-A, 43 FERC ¶ 61,394 (1988).

public interest.[18] PPL has not presented us with any evidence that any of these circumstances have occurred or will occur, but only that it is unable to receive transmission service credits under the Interconnection Agreement. Given these circumstances, we find that PPL has failed to meet the *Mobile-Sierra* public interest standard.

The Commission orders:

PPL's complaint is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[18] *See, e.g., Nevada Power Company, et al.*, 103 FERC ¶ 61,353 at P 9 (2003), *reh'g denied*, 105 FERC ¶ 61,185 (2003), *appeal pending sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC,* No. 03-74208 (9th Cir. Nov. 19, 2003).